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14-613

Reverse

Filed

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~395~~ 187

GEORGE Q. ERSKINE, PLAINTIFF IN ERROR, COLLECTOR OF INTERNAL REVENUE,

vs.

ROBERT HOHNBACH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED DECEMBER 13, 1870.

Dec 1870

SUPREME COURT OF THE UNITED STATES.

No. 395.

GEORGE Q. ERSKINE, PLAINTIFF IN ERROR, COLLECTOR OF INTERNAL REVENUE,

vs.

ROBERT HOHNBACH.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

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1 Circuit court of the United States of America for the eastern district of Wisconsin.

UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the third day) of October, A. D. 1870:

Present and presiding, the Honorable Thomas Drummond, circuit judge; and Honorable Andrew G. Miller, district judge; Charles S. Hamilton, marshal; Edward Kurtz, clerk.

Among other the following proceedings were had, to wit:

ROBERT HOHNBACH
vs.
GEORGE Q. ERSKINE. } At law.

Be it remembered that heretofore, to wit, on the twenty-fifth day of November, A. D. 1869, came the defendant, by his attorney, Mr. Hazelton, and presented to the clerk his petition as herein filed, duly
2 verified by affidavit, together with a certificate of counsel as required by law, praying that a writ of certiorari may issue to the circuit court for Milwaukee County, in the State of Wisconsin, requiring said court to send to this court the record and proceedings in a certain cause in said court wherein Robert Hohnbach is plaintiff, and George Q. Erskine, collector of internal revenue for this district, is defendant, which petition is as follows:

Petition for writ of certiorari.

United States of America, district of Wisconsin.

To the honorable the circuit court of the United States for the district of Wisconsin:

Your petitioner, George Q. Erskine, respectfully represents that, on the 10th day of November, 1869, in the circuit court of Milwaukee County, State of Wisconsin, an action was commenced by one Robert Hohnback, plaintiff, against your petitioner, defendant, by summons and complaint, a copy of which is hereto annexed and marked "A," and made a part of this petition; that no proceedings have been had in said action, on the part of this defendant, and no trial had therein; that this defendant, at the time of the supposed grievances and
3 cause of action set forth by the plaintiff, was, and from thence hath been, and still is, the collector of internal revenue for the first collection district, in the State of Wisconsin; that the said action is an action of trespass brought by said plaintiff against your petitioner for an alleged wrongful seizure or distraint of personal property belonging to the said plaintiff; but this petitioner states that the several acts done by this petitioner, and of which the plaintiff complains, were done by your petitioner by virtue of his office as collector aforesaid, and under the revenue laws of the United States, and by virtue and under color thereof, and for the purpose of collecting an assessment lawfully made against the said plaintiff under the laws of the United States, and not otherwise.

Your petitioner therefore prays that a writ of certiorari be issued in due form of law, and that said action, and the record and proceedings therein be transferred to this court.

GEORGE Q. ERSKINE.

Subscribed & sworn to this 23d day of November, 1869, before me.

EDWARD KURTZ,
Clerk U. S. Circuit Court, Wis.

I certify that, as counsel for the petitioner, I have examined the proceedings against him, in the action above set forth, and have
4 carefully enquired into all the matters set forth in the above petition, and that I believe the same to be true as set forth in said petition.

GEORGE W. LAKIN.

A.

Circuit court, Milwaukee County.

ROBERT HOHNBACH, PLAINTIFF,
against
GEORGE Q. ERSKINE, DEFENDANT.

To GEORGE Q. ERSKINE:

You have hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer on us, at our office, No. 395, East Water street, in the city of Milwaukee, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint as aforesaid, the plaintiff will apply to the court for the relief demanded in the complaint.

Dated Nov. 10th, 1869.

SMITH & SALOMON,
Plaintiff's Attorneys.

Circuit court, Milwaukee County.

ROBERT HOHNBACH, PLAINTIFF,
against
GEORGE Q. ERSKINE, DEFENDANT.

5 The above-named plaintiff respectfully shows that the above-named defendant, on or about the 20th day of May, 1869, at the city of Milwaukee, wrongfully seized and forcibly took from the plaintiff a large quantity of personal property, then & there belonging to the plaintiff, to wit: a steam-engine, with boiler, gearing, and belting; twenty-five thousand cigars; seven thousand pounds of smoking tobacco and shorts, packed and loose; five setts of small scales; one pairof large scales; one grindstone & gearing; two Roger's cutting machines; two tobacco presses; one kinnikinnick mill; six hundred pounds Wisconsin leaf tobacco; five thousand pounds of chewing tobacco; three stoves; a lot of fancy pipes; twelve boxes of smoking tobacco, assorted; an office clock; a desk & a safe; a set of implements, frames, and other articles of the value of ten thousand dollars; and

afterwards, on or about the first day July, 1869, the defendant wrongfully sold & converted the same to his own use, to the damage of the plaintiff twelve thousand dollars.

Wherefore the plaintiff demands judgement against the defendant for the wrong & injury aforesaid, and that the defendant pay him twelve thousand dollars damages besides costs.

SMITH & SALOMON,
Plaintiff's Attorneys.

6 Whereupon a writ of certiorari, issued in duplicate, as follows:

Writ of certiora.

THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the circuit court for Milwaukee County, in the State of Wisconsin, greeting:

Whereas George Q. Erskine, defendant, in a certain cause in said circuit court, wherein Robert Hohnbach is plaintiff, pursuant to section sixty-seven of an act of Congress, entitled "An act to declare the meaning of certain parts of the internal revenue act, approved June 30, 1864, and for other purposes," approved July 13, 1866, has this day presented to the clerk of the circuit court of the United States for the district of Wisconsin, his petition, duly verified by affidavit, together with a certificate signed by an attorney of the circuit court of the United States for this district, setting forth that, as counsel for the petitioner, he has examined the proceedings against him, and carefully enquired into all the matters set forth in the petition, and that he believes the same to be true.

Therefore, you are hereby commanded that you send the record and proceedings in said cause, wherein Robert Hohnback is plaintiff
7 and George Q. Erskine is defendant, to the said circuit court of the United States for the district of Wisconsin, without delay.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States at the city of Milwaukee, in said district of Wisconsin, this twenty-fifth day of November, in the year of our Lord one thousand eight hundred & sixty-nine, and of our independence the 94th.

EDWARD KURTZ,
Clerk of the Circuit Court of the United States for the District of Wisconsin.

Marshal's return of service.

Certiorari returned. "Served on James Hickox, clerk of the within-named circuit court of Milwaukee County, by delivery to him personally, a duplicate of this writ, this 26th day of November, 1869.

"C. S. HAMILTON, *Marshal,*
"By C. H. HAMILTON, *Deputy.*

"Fees, $2 06."

DECEMBER 31, 1869.—Record and proceedings in the circuit court for Milwaukee County, duly certified by the clerk of said court, received from said clerk & filed, which are as follows:

Record & proceedings of circuit court of Milwaukee Co.

(Duplicate.)

THE UNITED STATES OF AMERICA, *ss :*

[SEAL.] The President of the United States of America to the circuit court for Milwaukee County, in the State of Wisconsin, greeting:

8 Whereas George Q. Erskine, defendant in a certain cause in said circuit court, wherein Robert Hohnbach is plaintiff, pursuant to section 67 of an act of Congress, entitled "An act to declare the meaning of certain parts of the internal revenue act, approved June 30, 1864, and for other purposes," approved June 13, 1866, has this day presented to the clerk of the circuit court of the United States for the district of Wisconsin, his petition, duly verified by affidavit, together with a certificate, signed by an attorney of the circuit court of the United States for this district, setting forth that, as counsel for the petitioner, he has examined the proceedings against him, and carefully enquired into all the matters set forth in the petition, and that he believes the same to be true; therefore you are hereby commanded that you send the record and proceedings in said cause, wherein Robert Hohnbach is plaintiff, and George Q. Erskine is defendant, to the said circuit court of the United States for the district of Wisconsin, without delay.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in said district of Wisconsin, this twenty-fifth day of November, in the year of our Lord one thousand eight hundred & sixty-nine, and of our independence the 94th.

9 EDWARD KURTZ,
Clerk of the Circuit Court of the United States for the District of Wisconsin.

(Indorsed:) 533. Law docket B. U. S. circuit court Wisconsin. Robert Hohnbach vs. George Q. Erskine. Duplicate certiorari. Filed Nov. 26, 1869. James Hickox, clerk.

Pleas before the Honorable Jason Downer, judge of the second judicial circuit of the State of Wisconsin, and presiding judge of the circuit court within and for the county of Milwaukee, in said State, at a term of said court begun and holden at the court-house in the city of Milwaukee, on the third Monday of September, A. D. 1869.

JAMES HICKOX, *Clerk.*

GUSTAV BRUNST, *Sheriff.*

ROBERT HOHNBACH
against
GEORGE Q. ERSKINE.

10 Be it remembered that heretofore, to wit, on the 15 day of November, A. D. 1869, came the said plaintiff, by his attorneys, and filed in the office of the clerk of the court aforesaid his certain summons and complaint in the words and figures following, to wit:

Circuit court Milwaukee County.

ROBERT HOHNBACH, PLAINTIFF,
against
GEORGE Q. ERSKINE, DEFENDANT.

To GEORGE Q. ERSKINE.

SIR: You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and serve a copy of your answer on us, at our office, No. 395 East Water street, in the city of Milwaukee, within twenty days after the service hereof, exclusive of the day of such service. And if you fail to answer the complaint as aforesaid, the plaintiff will apply to the court for the relief demanded in the complaint.

Dated Nov. 10th, 1869.

SMITH & SALOMAN,
Plaintiff's Attorneys.

MILWAUKEE COUNTY, *ss:*

I certify that, on the 10th day of November, 1869, at the city & county of Milwaukee, I served the within summons & the annexed complaint on the within-named defendant, George Q. Erskine, personally, by delivering copies thereof to, and leaving the same with, him, and
11 that I endorsed, over my signature, on said copies so served, the date of such service, and that the same were true copies of the original summons & complaint.

GUSTAV BRUNST, *Sheriff.*
By W'M G. PARSONS, *Under Sheriff.*

Fees, $2 25.

Circuit court Milwaukee County.

ROBERT HOHNBACH, PLAINTIFF,
against
GEORGE Q. ERSKINE, DEFENDANT.

The above-named plaintiff respectfully shows that the above-named defendant, on or about the 20th day of May, 1869, at the city of Milwaukee, wrongfully seized, & forcibly took from the plaintiff, a large quantity of personal property then & there belonging to the plaintiff, to wit: a steam engine, with boiler, gearing, & belting; twenty-five thousand cigars; seven thousand pounds of smoking tobacco and shorts, packed & loose; five sets of small scales; one pair of large scales; one grindstone & gearing; two Rogers' cutting machines; two tobacco pressess; one kinnikinnick mill; six hundred pounds Wisconsin leaf tobacco; five thousand pounds of chewing tobacco; three stoves; a lot of fancy pipes; twelve boxes of smoking tobacco assorted; seven other boxes of smoking tobacco assorted; an office clock; a desk & a safe; a set of implements, frames, and other articles, of the value of ten
12 thousand dollars; and afterwards, on or about the first day of July, 1869, the defendant wrongfully sold & converted the same to his own use, to the damage of the plaintiff twelve thousand dollars.

Wherefore the plaintiff demands judgment against the defendant for the wrong & injury aforesaid, & that the defendant pay him twelve thousand dollars damages, besides costs.

SMITH & SALOMAN,
Plaintiff's Attorneys.

Afterwards, to wit, on the 26th day of November, A. D. 1869, comes

the said defendant, by his attorney, and files duplicate writ of certiorari to circuit court of the United States for the district of Wisconsin.

JAMES HICKOX, *Clerk.*

STATE OF WISCONSIN,
Circuit Court Milwaukee County, ss:

I, James Hickox, clerk of said court, do hereby certify that I have compared the foregoing copy with the original record and proceedings entered in the action therein entitled; that it is a correct transcript therefrom and of the whole thereof, as the same remains of record in my office; and I herewith return the duplicate writ of certiorari, served upon me in said action.

In testimony whereof I have hereunto set my hand and affixed
13 the seal of said court, this ninth day f December, A. D. 1869.

[SEAL.] JAMES HICKOX, *Clerk.*

STATE OF WISCONSIN,
County of Milwaukee, ss:

I, Jason Downer, do hereby certify that I am judge of the second judicial circuit of said State, and presiding judge of the circuit court within and for the county of Milwaukee; that James Hickox, whose name is subscribed to the certificate subjoined to the within record is, and was at the date of said certificate, clerk of the circuit court of the county of Milwaukee, and State aforesaid, duly elected and qualified; that I am well acquainted with his handwriting, and know the signature thereto to be genuine; and further, that said certificate or attestation is in due form of law, and that the seal thereto attached is the proper seal of said court.

Done at Milwaukee, in said county, on this 31st day of December, A. D. 1869.

JASON DOWNER, *Judge.*

JANUARY 15, 1870.—This day came the plaintiff, by his attorneys, Messrs. Smith & Salomon, and filed his declaration, as follows:

Declaration.

14 Circuit court of the United States for the district of Wisconsin of the first Monday of January, A. D. 1870.

DISTRICT OF WISCONSIN, *ss:*

Robert Hohnbach, plaintiff in this suit, complains of George Q. Erskine, defendant in this suit, of a plea of trespass; for that the said defendant, on the twentieth day of May, in the year eighteen hundred sixty-nine, at the city of Milwaukee, in the said district, with force & arms, seized & took certain goods, chattels, & effects of the plaintiff, to wit: One steam-engine, with boiler, gearing, & belting; twenty-five thousand cigars; seven thousand pounds of smoking tobacco & shorts, packed & loose; five sets of small scales; one pair large scales; one grindstone & gearing; two Rogers' cutting machines; two tobacco presses; one kinnikinnick mill; six hundred pounds Wisconsin leaf tobacco; five thousand pounds of chewing tobacco; three stoves; one lot of fancy pipes; twelve boxes of smoking tobacco, assorted; one office clock; a desk; one safe; one set of implements, frames, & other articles of great value, to wit, of the value of ten thousand dollars, then & there found & being, and converted & disposed of the same to his own use, and other wrongs to the said plaintiff then & there did, to the
15 great damage of the plaintiff, & against the peace of the United

States. Wherefore the said plaintiff saith that he is injured, & hath sustained damage to the amount of twelve thousand dollars, & therefore he brings this suit, &c.

SMITH & SALOMON,
Pl'ff's Att'ys.

FEBRUARY 26, 1870.—This day came the defendant, by his attorney, Mr. Hazelton, and filed his pleas, as follows:

Pleas.

UNITED STATES CIRCUIT COURT,
District of Wisconsin.

GEORGE Q. ERSKINE
ads.
ROBERT HOHNBACH.

And now comes the said defendant, George Q. Erskine, by G. W. Hazelton, United States attorney, and defends the force and injury, when, &c., and says that he is not guilty of the said several supposed greivances above laid to his charge, or any or either of them, in manner and form as above set forth in the plaintiff's declaration; and of this the said defendant puts himself upon the country, &c.

By G. W. HAZELTON,
U. S. Att'y Dist. Wis.

16 And for a further plea in this behalf the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because, he says, that before and at the time of the said several supposed trespasses set forth in the plaintiff's declaration, to wit, at the district of Wisconsin aforesaid, this defendant was then and there collector of internal revenue for the first collection district for the United States in the State of Wisconsin, and was then and there duly commissioned, qualified, and authorized to act in that behalf, as such collector, for and on behalf of the United States, agreeably to instructions of the proper officer, and according to the statutes in such case made and provided; and that the said plaintiff, at the said times when, &c., was then and there a manufacturer of tobacco and a dealer in tobacco; and the defendant avers that the said plaintiff, so being a manufacturer of and dealer in tobacco, the said plaintiff, for and during the months of December, 1868, and January and February, 1869, sold from and out of his business establishments in Milwaukee, in said district, six hundred and forty-five pounds of fine-cut chewing to-
17 bacco, on which the tax was 32 cents per pound over and above the amount of internal revenue tobacco stamps which he, the said plaintiff, had purchased with which to stamp such tobacco, and the tax on which excess amounted to the sum of $206 40.

And that, during the same months the plaintiff sold from and out of his said business establishment 2,855 pounds of smoking tobacco, on which the tax was 16 cents per pound over and above the amount of internal revenue stamps which he, said plaintiff, had purchased with which to stamp such tobacco, and the tax on which excess amounted to $456 80, and that during another period, and prior to the assessment hereinafter set forth, the said plaintiff used in the manufacture of tobacco a riddle coarser than that prescribed by law, and thereby attempted to defraud the United States out of the tax on 15,977 pounds of tobacco, on which the tax was 32 cents per pound, amounting to

$2,556 32, being 16 cents per pound less than the tax as returned and paid by said plaintiff. And the defendant avers that for the aforesaid violations of the internal revenue laws, and divers other violations and breaches of the law by the said plaintiff, an assessment was duly
18 & legally made by the assessor of internal revenue for said district, then and there acting by and under the instructions of the Commissioner of Internal Revenue and the laws of the United States, to the amount of $3,444 88, of which the said plaintiff afterwards, then and there had due notice.

And the defendant avers that afterwards, and before the collection of said assessment, and before any distraint was made for the collection of said assessment, the said plaintiff took and made an appeal from said assessment to the Commissioner of Internal Revenue, according to law, the said Commissioner then and there having jurisdiction in the premises, and the said assessment and the decision of the said collector in the premises was afterwards duly affirmed and adjudged to be legal and correct, and was ordered by said Commissioner of Internal Revenue to be collected by this defendant as such collector of internal revenue. And that pursuant to such order, and the statutes in such case made and provided, this defendant, as such collector, afterwards, and after further notice had been given to the plaintiff to pay such assessment, and after his neglect and refusal to pay the same, issued his warrant of distraint in due form of law to his deputy, and that
19 by virtue of such assessment so duly issued, and pursuant to the instructions of the Commissioner of Internal Revenue, and the statutes in such case made and provided, and not otherwise, this defendant, for the causes aforesaid, distrained said goods and chattels specified in said declaration of the plaintiff, and afterwards advertised and sold the same at public auction, according to law, to the highest and best bidder, for cash in hand for the said sum, to wit, for the amount of said assessment and costs, and paid the same into the United States depositary at Milwaukee, Wisconsin, in satisfaction of such assessment and costs, which are the same several supposed trespasses and grievances complained of in the plaintiff's declaration, and not other or different. All which the defendant is ready to verify.

Wherefore the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him.

G. W. HAZELTON,
U. S. Att'y, Dist. Wis.

I certify that, in my opinion, the above special plea is well founded.

G. W. HAZELTON,
U. S. Att'y Dist. Wis.

20 MARCH 22, 1870.—This day came the plaintiff, by his attorneys, and filed his application, as follows:

Replication.

Circuit court of the United States for the district of Wisconsin.

ROBERT HOHNBACH *agt.* GEORGE Q. ERSKINE.

And the said plaintiff, as to the plea of the defendant first above pleaded, & whereof he hath put himself on the country, doth the like.

And the said plaintiff, as to the plea of the defendant secondly above

pleaded, as to the said trespasses therein mentioned, saith that the said plaintiff, by reason of anything in that plea alleged, ought not to be barred from having & maintaining his aforesaid action thereof against the said defendant, because he saith that the said defendant at the said time when, &c., of his own wrong, & without the cause by him in his said second plea alleged, committed the said several trespasses in the said second plea mentioned, in manner & form as the said plaintiff hath above in his said declaration complained against the said defendant. And this the said plaintiff prays may be enquired of by the country, &c.

21 And the said defendant doth the like.

SMITH & SALOMON,
Plff's Att'ys.

And afterwards, to wit, at a stated term of said court, begun and held according to law, at the city of Milwaukee, on the second Monday (being the eleventh day) of April, A. D. 1870, and on the sixteenth day of said term, to wit, on the twenty-eighth day of April, A. D. 1870, the following proceedings were had, to wit:

Order allowing add'l plea to be filed.

ROBERT HOHNBACH
vs. } At law.
GEORGE Q. ERSKINE.

This day came the parties, by their counsel, and the defendant, by leave of the court, filed an additional plea. The plaintiff filed a replication thereto, and the defendant filed his rejoinder; which several papers are as follows:

Defendant's third plea.

Circuit court of the United States, district of Wisconsin.

GEORGE Q. ERSKINE
ads.
ROBERT HOHNBACH.

22 And for a further plea in this behalf the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action against him, the said defendant, because he says *because he says* that heretofore, to wit, on the 20th day of April, A. D. 1869, George B. Bingham was assessor of internal revenue of the United States for the first district of Wisconsin, duly appointed & commissioned, and actually exercising the duties of said office; that afterwards, to wit, on the day & year last aforesaid, the said Bingham, as such assessor, made, executed, and delivered to the said defendant, he, the said defendant, then & there being collector of internal revenue of the United States for the said first district of Wisconsin, a certificate & copy of a certain assessment of a certain tax against the said plaintiff, amounting to the sum of three thousand two hundred nineteen dollars & fifty-two cents, which the said Bingham, as such assessor, had before that time assessed against the said plaintiff, who was then and there a resident of said district, engaged in the manufacture of tobacco therein, and subject to taxation under the acts of Congress relating to the collection of

internal revenue of the United States; that said copy of said
23 assessment so certified by said Bingham as such assessor to said defendant as such collector, was in the usual form provided by law, and a copy of the formal parts thereof, and of so much thereof as relates to the said plaintiff, is hereto attached and marked Exhibit "A," & copy of said certificate is hereto attached & marked Exhibit E; that, upon receiving said copy of assessment, it became & was the duty of the defendant, to proceed and collect the said amount so assessed against the said plaintiff, together with five per cent. penalty in addition thereto if not paid within said month, and interest at one per cent. per month; that thereupon, in pursuance of the power & authority by law vested in said defendant in that behalf, he, the said defendant, gave to said plaintiff, at Milwaukee, in said district, to wit, on the 20th day of April, A. D. 1869, a demand notice that the said tax assessed against him for the month of March, A. D. 1869, amounting to the sum of three thousand two hundred & nineteen dollars & fifty-two cents, was due & payable on or before the last day of April, A. D. 1869, & that unless the same should be paid within that time it would become the duty of the said defendant, as such collector, to collect the same, with a penalty of five per centum additional, and interest at one per centum per
24 month—a copy of said notice is hereto attached & marked Exhibit B; that said plaintiff did not pay nor offer to pay to said defendant said sum, or any part thereof, within the time named in said notice; that thereupon, on the 18th day of May, A. D. 1869, the said defendant issued to John W. Hinton, his deputy, a deputy collector of internal revenue of the United States for said district, a warrant commanding him to distrain upon so much of the goods, chattels, & effects of said plaintiff, if any such could be found, as might be necessary for the payment of the taxes and penalty due & owing by said plaintiff, as set forth in the schedule accompanying said warrant, (copy of which is Exhibit "A," hereto attached,) and also for the payment of all necessary & reasonable fees & expenses of said distraint, with the commission chargeable by law, a copy of which warrant is hereto attached & marked Exhibit C; that thereupon the said Hinton, as deputy as aforesaid, under said warrant, made distraint upon the property mentioned in said declaration, belonging to the said plaintiff, in said district, to wit, on the 18th day of May, A. D. 1869, and then & there gave said plaintiff notice thereof by publication of notice, of which a copy is hereto attached and marked D; that said defendant, not being
25 paid any part of said tax, the said Hinton, as deputy as aforesaid, sold said property at public auction to the highest bidder, on the 1st day of July, A. D. 1869, and applied the proceeds thereof in satisfaction of said tax, penalty, interest, & costs, said property having sold for just sufficient to pay those sums, being the sum of three thousand, four hundred forty-four dollars & 88 cents; and this defendant says that the distraint aforesaid is the identical taking complained of in the declaration, and not other or different.

And this the defendant is ready to verify. Wherefore the defendant prays the judgment of said court if said plaintiff ought to have or maintain his aforesaid action thereof against him, said defendant.

G. W. HAZELTON,
U. S. Dist. Att'y.

I certify that, in my opinion, the above plea is well founded in law.

MATT. H. CARPENTER,
Of Counsel.

Ex't "A."

26 [No 23.]

Alphabetical list of persons in division No. three, of collection district No. one, of the State of Wisconsin, liable to a tax under the excise laws of the United States, and the amount thereof as assessed by H. A. Whitney, assistant assessor, and by G. B. Bingham, assessor, returned to the collector of said district for the month of March, 1869.

Assessors must be particular to fill all the blanks in this form, as far as practicable, and to number all articles and occupations upon which taxes are assessed to correspond with the entry in the abstract.

The blank columns below are to facilitate the collector in making up Form 51.
Enter in the narrow column the number of the day on which payment was made for either month named in the headings, and enter the amount collected in the column denoting the month in which collected.
The first column will be headed the same month as the list, and the two following ones for the next months in order.
Any amount not collected within the months indicated may have the month in which it is paid written opposite, in red ink, in one of the columns.

No. of line.	Name.	Location and post office address.	Article or occupation.	No. in abstract.	Quantity or valuation.	Rate of tax.	Amount of tax upon particular article.	Total.		No. of day.			Abated as erroneous.	No. of line.
1	Hohnbach, Ro'bt...	142, 144. W. Water.	Cigar manuf'ct'r	26										1
2			Fine cut chewing,											2
3			deficiency for											3
4			Dec., Jan'y, &											4
5			Feb'y, 1868 &											5
6			1869.....	110	645 lbs.	32 c.	206.40							6
7			Smoking tob. for											7
8			Dec., Jan'y, &											8
9			Feb'y, &c ...	112	2,855 lbs.	16 c.	456.80							9
10			Shorts reported											10
11	"A"		16c. liable to 32c	113	15,977 lbs.	16 c.	2,556.32	$3,219 52		July, 1		3,219 52		11

27 [17] (Copy.)

EXHIBIT "B."

Monthly notice.—List March.—Div. ——.

OFFICE OF THE COLLECTOR OF INTERNAL REVENUE,
1ST DISTRICT, STATE OF WISCONSIN,
Milwaukee, April 20th, 1869.

M R. HOHNBACH:

The tax assessed against you for the month of March, 1869, amounting to $3,219 52, is due and payable on or before the last day of April, 1869, and unless paid within that time it will become my duty to collect the same with a penalty of five per centum additional, and interest at one per centum per month.

G. Q. ERSKINE, *Collector.*

Bring this notice with you.

28 [69] EXHIBIT C.

Warrant.

UNITED STATES OF AMERICA,
First Collection District, State of Wisconsin.

To JOHN W. HINTON, *Deputy Collector:*

Whereas, in pursuance of the provisions of the acts of Congress of the United States to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes, the several persons and firms named in the list or schedule signed by me, and hereto annexed, have become chargeable with, and are indebted to the United States for, the taxes assessed against them respectively, in the amount set forth opposite the name of each in the aforesaid list or schedule, together with the penalty as therewith stated, amounting, in the aggregate, to $3{,}460\frac{03}{100}$ dollars, for neglect to pay the said tax when the same became due; and whereas more than ten days have elapsed since payment of said taxes was demanded of each of said persons or firms, and as they still neglect and refuse to pay the same, you are hereby commanded to distrain upon so much of the goods, chattels, and effects of each of them, respectively, if any such can be found, as may be necessary for the payment of the taxes and penalties due and owing by them, respectively, as set forth in the aforesaid schedule, and also for the payment of all necessary and reasonable fees and expenses of each said distraint, with the commission chargeable by law. And you will safely keep all property so distrained, and do all things needful and necessary to be done in the premises, as required by law, before the sale thereof. But in case sufficient goods, chattels, and effects cannot be found, then you are hereby commanded to seize so much of the real estate of each of said persons or firms as may be necessary for the purposes aforesaid. And for so doing this shall be your warrant; of which make due service, and return to me at this office.

Witness my hand and official seal, at Milwaukee, this eighteenth day of May, anno Domini 1869.

[SEAL.] (Signed) G. Q. ERSKINE,
Collector of Internal Revenue,
First District of Wisconsin.

(Indorsed:) Copy. Warrant to John W. Hinton, dep. collector. Special & monthly taxes, March list, 1869.

(Copy.)

SCHEDULE.

Name.	Location.	Description of tax.	Amount of tax.	Penalty.	Total.	Remarks.
Divl. SPECIAL TAXES, MARCH LIST, 1869.						
2. Fr. Borchert	510 Chestnut st.	Cattle broker	1 67	08	1 75	Cannot be found.
3. Anton Neichstein	Greenfield	Auctioneer	83	04	87	Paid to Mr. Stewart, dep. coll.
3. Sallentine & Hunkel	210 W. W	Wholesale liquor dealers.	8 33	41	8 74	Claim for remission.
6. James Canavan	203 Main	Retail liquor dealer	4 17	20	4 37	Gone to White Pine. No property.
MONTHLY TAXES, MARCH LIST, 1869.						
2. A. L. Schneidt	702 Prairie st	Man'f. sales	4 56	22	4 78	Paid to Mr. Stewart.
3. Colclough & Campbell	Brick yard, 4th ward	" "	34	1 70	35 70	Paid by J. W. H., May 27, '69. S.
3. Rob't Hohnbach	142 & 144 W. W	On tobacco	3,219 52	160 97	3,380 49	Paid " J. W. inton, July 1, '69. S.
3. J. N. Schoonmacher & Co	Wanwatosa, (city P. O.)	Manuf. sales	5 50	27	5 77	Paid by J. W. H., June 4, '69. S.
5. W. P. Horton	475 Grove st	1 gold watch	2	10	2 10	Paid by J. W. H., June 10, '69. S.
5. Hawks & Burdeck	257 S. Water st	Manuf. sales	44	02	46	Paid by J. W. H., May 27, '69.
5. James Sheriff	126 Barclay st	" "	5 97	29	6 26	" " J. W. H., " 27, '69.
6. William Melins	220 Main "	" "	8 32	42	8 74	Paid July 9, '69, by J. W. Hinton. S.
			$3,295 31	$164 72	$3,460 03	

30 EXHIBIT D.

United States tax sale.

OFFICE OF COLLECTOR OF U. S. INTERNAL REVENUE,
FIRST DISTRICT OF WISCONSIN,
Milwaukee, May 20, 1869.

To ROBERT HOHNBACH:

You are hereby notified that I have made seizure of the following-described personal property, situated at numbers 142 and 144 West Water Street, in the city of Milwaukee, county of Milwaukee, and State of Wisconsin, for the non-payment of a revenue tax assessed against you, and returned to this office for collection:

One steam-engine, boiler, gearing, and belting.
Twenty-five thousand cigars.
Seven thousand pounds of smoking tobacco and shorts, packed and loose.
Five sets small scales; one pair large scales.
One grind-stone and gearing.
Two Rogers' cutting-machines.
Two tobacco presses; one killickinnick mill.
Six hundred pounds Wisconsin leaf tobacco.
Five thousand pounds of chewing tobacco.
Three stoves; one lot of fancy pipes.
Twelve boxes smoking tobacco, assorted.
Seven boxes smoking tobacco, assorted.
One office clock, desk, and safe.
Set of implements, frames, &c.

31 You are hereby further notified that I shall sell the above described property at public sale, at Nos. 142 and 144 West Water street, in the city of Milwaukee, to the highest bidder, on Monday, the seventh day of June, eighteen hundred and sixty-nine, at ten o'clock in the forenoon, of said day.

GEORGE Q. ERSKINE,
Collector of Internal Revenue First District Wis.,
Per JOHN W. HINTON, *Deputy.*

32 [23½] EXHIBIT E.

Aggregate list of taxes assessed and returned to collector.

[To be executed in quadruplicate—one copy to be forwarded by the assessor to the Secretary of the Treasury, one copy to the First Comptroller of the Treasury, and one copy to the Commissioner of Internal Revenue; the other copy to be attached to the list on Form 23.]

I, G. B. Bingham, assessor for the first collection district of Wisconsin, hereby certify that I have this day delivered to Geo. Q. Erskine, collector for the same district, an alphabetical list of taxes assessed within said district for the month of March, 1869, amounting to thirty thousand two hundred eighty-two & $\frac{93}{100}$ dollars, as follows: $30,282 93.

(Signed) G. B. BINGHAM,
Assessor First District of Wisconsin.

Dated at Milwaukee, this 20 day of April, 1869.

Collector's receipt.

I hereby acknowledge the receipt from G. B. Bingham, assessor for the first district of Wisconsin, a list as above described, amounting to thirty thousand two hundred eighty-two & $\frac{93}{100}$ dollars.
$30,282 93.

G. Q. ERSKINE,
Collector First District of Wisconsin.

Dated at Milwaukee, this 20 day of April, 1869.

(Indorsed:) (23½.) Geo. Q. Erskine, collector 1st district of Wisconsin. Month of March list, 1869. Receipted for April 20, 1869.

33 *Replication to third plea.*

Circuit court of the United States for the district of Wisconsin.

ROBERT HOHNBACH
vs.
GEORGE Q. ERSKINE.

And the said plaintiff as to the said plea by the defendant thirdly above pleaded, as to the said trespasses therein mentioned & attempted to be justified, saith that the said plaintiff, by reason of anything in that plea alleged, ought not to be barred from having & maintaining his aforesaid action thereof against the defendant, because he saith that the tax assessed against him as alleged in that plea was never owing by or chargeable upon him, inasmuch as he did not manufacture & sell or remove within the period mentioned in the assessment set forth in that plea the tobacco therein mentioned, or any part thereof, but only other tobacco upon which he paid the tax chargeable therefor, at the several times prescribed therefor, to wit, on the last day of each month during the period aforesaid.

And the said plaintiff says that he has paid the taxes chargeable against him under the laws of the United States upon all the
34 tobacco manufactured by him & sold or removed for consumption or use during the period mentioned in the said assessment.

And this the said plaintiff is ready to verify, wherefore the said plaintiff prays judgment & his damages by him sustained, by reason of the committing of the said trespasses to be adjudged to him, &c.

SMITH & SALOMON,
Plff's Att'ys.

Rejoinder.

Circuit court United States, district of Wisconsin.

ROBERT HOHNBACH
vs.
GEORGE Q. ERSKINE.

And the said defendant says that the plaintiff ought not by reason of anything in said replication contained to have or maintain his aforesaid action against the defendant, because he says that the said plain-

tiff has not paid the taxes chargeable against him under the laws of the United States upon all the tobacco manufactured by him & sold or removed for consumption or use during the period mentioned in the said assessment, to wit, he has not paid the said sum assessed against
35 him as in said plea stated, which sum was duly assessed against the said plaintiff for tobacco manufactured by him & sold or removed for consumption or use during the period mentioned in the said assessment; and this the said defendant prays may be enquired of by the country.

G. W. HAZELTON,
Att'y for Def't.

And the said plaintiff doth the like, &c.

S. & S.

Trial.

Whereupon the issues herein came on to be tried, and a jury was called to try the same, who came, to wit: Lyman Powers, Peter Wheelock, Skidmore E. Lefferts, Sereness S. Herring, Henry E. Dickinson, Isaac Selleck, Patrick Donnelly, John S. Mitchell, Charles H. Warner, John Hart, George Tracy, and Martin Larkin, sen'r, twelve free, honest, and lawful men of the district, who were severally sworn and empannaled, and the trial not being concluded the same was adjourned until to-morrow morning.

APRIL 29, 1870.—This day came the parties, by their counsel, and the trial of the issues herein was resumed, and, not being concluded,
36 the same was adjourned until to-morrow morning.

Jury disagreed & discharged.

APRIL 30, 1870.—This day came the parties by their counsel and the trial of the issues herein was resumed. And the jurors of the jury aforesaid being charged by the court, retired to their room under the charge of a sworn officer, to deliberate on their verdict; and afterwards the said jurors of the jury came into court, and not having agreed upon their verdict, and not being likely to agree, they were thereupon discharged and the cause continued.

JUNE 27, 1870.—This day came the plaintiff, by his counsel, and on his motion and affidavit filed, it is ordered by the court that this cause be, and hereby is, continued.

OCTOBER 26, 1870.—This day came the plaintiff, by his counsel, and on his motion, it is ordered by the court that an attachment be issued against John Heiss for his not appearing and answering as a witness in this case, pursuant to a subpœna served on him. Attachment issued.

37 And now at this same term, to wit, October term, A. D. 1870, and on the twenty-second day thereof, to wit, on the twenty-seventh day of October, A. D. 1870: Present, the Honorable Thomas Drummond, circuit judge, presiding, the following proceedings were had, to wit:

Second trial.

ROBERT HOHNBACH
vs
GEORGE Q. ERSKINE. } At law.

This day came the parties, by their counsel, and the issues herein came on to be tried. Whereupon a jury was called to try the same who came, to wit: John F. Birchard, Edward Emery, Eleazer Everett, Bidwell W. Brown, Charles Fricke, Enos Gay, John Ewing, Walter H. Moody, Hamilton Townsend, Jesse Shepard, H. M. Northrop, and D. D. French, twelve free, honest, and lawful men of the district. By consent, the said juror D. D. French, was excused and allowed to withdraw from the box, and that the trial proceed with the remaining eleven jurors, each party waiving all exception thereto. And the said eleven jurors were then sworn and empanneled, and the trial not being concluded, the same was adjourned until to-morrow morning.

38 And afterwards, to wit, on the twenty-third day of said term, to wit, on the twenty-eighth day of October, A. D. 1870—present the Honorable Thomas Drummond, circuit judge, presiding—the following proceedings were had, to wit:

Trial continued.

ROBERT HOHNBACH
vs.
GEORGE Q. ERSKINE. } At law.

This day came the parties, by their counsel, and the trial of the issues herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the twenty-fourth day of said term, to wit, on the twenty-ninth day of October, A. D. 1870—present the Honorable Thomas Drummond, circuit judge, presiding—the following proceedings were had, to wit:

Verdict.

ROBERT HOHNBACH
vs.
GEORGE Q. ERKSINE. } At law.

This day came the parties, by their counsel, and the trial of the issues herein was resumed. And the jurors of the jury aforesaid being
39 charged by the court on their said oaths respectively, do say that they find the several issues herein in favor of the plaintiff, and that the defendant is guilty in manner and form as the plaintiff hath herein declared against him, and assess the damages to the said plaintiff, at the sum of four thousand one hundred and five dollars and forty-six cents.

And came the defendant, by his counsel, and moved the court in arrest of judgment, for reasons filed, as follows:

Motion in arrest of judgment.

Circuit court of the United States for the eastern district of Wisconsin.

ROBERT HOHNBACH
vs.
GEORGE Q. ERSKINE.

Here in court comes the said defendant, by his said attorney, and moves the court now here that an order directing an arrest of judgment be entered in this cause, for the following among other reasons:

(1.) The record does not show a case which entitles the plaintiff to recover a judgment against said defendant.

(2.) That this action, which is an action of trespass, is not maintainable against the defendant on the case made by the record.

(3.) That the defendant's third plea shows a good defence to this action; and the replication of the plaintiff thereto, does not answer the same, because it does not state nor allege that the plaintiff made an appeal from the assessment mentioned in said plea, to the Commissioner of Internal Revenue, as required by law; and unless such appeal was made, the plaintiff is not entitled to recover the tax which was assessed and collected as stated in said plea, nor to recover at all in this form of action.

(4.) That the defendant's third plea shows that the taking mentioned in the declaration, was a taking by the defendant as collector of internal revenue of the United States for the 1st congressional district, first revenue district of the State of Wisconsin, after an assessment of special tax against the said plaintiff, in form duly made and certified to said defendant by the assessor of internal revenue of said district, and that the defendant proceeded regularly in the seizure and sale of said property to make said tax assessed.

This plea therefore shows a state of case which is fatal to the action of trespass; the only remedy of the plaintiff being an action of assumpsit to recover back the tax so assessed.

Or, if the action of trespass can be maintained at all, on such a state of facts, still after the third plea of the said defendant in this action, it became necessary for the plaintiff in his replication thereto to show facts, bringing the case within the act of Congress, authorizing a suit to recover back the amount of the tax so levied, to wit: first, that the said tax was illegally and improperly assessed; and, second, that the plaintiff made an appeal from the said assessment to the commissioner of internal revenue of the United States, as required by law to be made before suit can be maintained to recover back said tax. This the said replication does not pretend to do; and therefore it does not appear from the said declaration, the said third plea and the subsequent pleadings founded upon said third plea, that the plaintiff is entitled to recover in this action.

The defendant being allowed to file several pleas, each plea, if valid in law, constitutes a distinct and separate defence to the action, and must be completely met by the subsequent pleading of the plaintiff founded on such plea, or the plaintiff does not become entitled to judgment, notwithstanding the verdict, which only establishes the truth of the plaintiff's reply to the said plea.

G. W. HAZELTON,
Attorney for Defendant.

MATT. H. CARPENTER,
Of Counsel.

And afterwards, to wit, on the thirtieth day of said term, to wit, on the fifth day of November, A. D. 1870:

Present, the Honorable Thomas Drummond, circuit judge, presiding, the following proceedings were had, to wit:

Motion in arrest of judgment overruled and judgment entered.

ROBERT HOHNBACH } *vs.* GEORGE Q. ERSKINE. } At law.

This day came the parties, by their counsel, and the motion of the defendant in arrest of judgment having been argued and submitted, on consideration thereof, it is ordered by the court that the said motion be, and hereby is, overruled.

Whereupon it is considered and adjudged by this court now here, that the plaintiff do have and recover of the said defendant, George Q. Erskine, the sum of four thousand one hundred and five dollars and forty-six cents damages so as aforesaid, assessed by the jury, together with two hundred & ninety-four dollars & eighty-three cents, his costs about his said suit in this behalf by him expended, and that he have
43 execution therefor. Judgment-roll signed November 5th, A. D. 1870.

EDWARD KURTZ, *Clerk.*

Damages	$4,105 46
Costs	294 83
	$4,400 29

Judgment-roll filed November 5th, A. D. 1870, at 5 o'clock, p. m.
EDWARD KURTZ, *Clerk.*

NOVEMBER 9, 1870.—This day came the defendant and filed his bond, with George B. Goodwin and S. C. West, as sureties in the penalty of ten thousand dollars, conditioned that said defendant shall prosecute a writ of error to effect, and answer all damages and costs if he shall fail to make his plea good; which bond is approved by the district judge, and is as follows:

Bond for supersedeas.

Know all men by these presents that we, George Q. Erskine, as principal, and George B. Goodwin & S. C. West, as sureties, are held and firmly bound unto Robert Hohnbach in the full and just sum of ten thousand dollars, to be paid to the said Robert Hohnbach, or his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with
44 our seals and dated this 5th day of November, in the year of our Lord one thousand eight hundred and seventy.

Whereas lately at a term of the circuit court of the United States for the eastern district of Wisconsin, in a suit depending in said court between Robert Hohnbach, plaintiff, & said George Q. Erskine, defendant, a final judgment was rendered against the said George Q. Erskine, and the said George Q. Erskine having obtained a writ of error and

filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Robert Hohnbach, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next.

Now the condition of the above obligation is such, that if the said George Q. Erskine shall prosecute his said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

CHAS. D. STONER.	GEORGE Q. ERSKINE.	[L. S.]
H. E. SHERMAN.	GEO. B. GOODWIN.	[L. S.]
A. STEWART.	S. C. WEST.	[L. S.]

45 EASTERN DISTRICT OF WISCONSIN, *ss:*

We, Geo. B. Goodwin & S. C. West, sureties on the within bond, being duly sworn, each for himself, on oath says that he is worth more than the sum of ten thousand dollars over & above all debts & exemptions of property from forced sale on execution.

S. C. WEST.
GEO. B. GOODWIN.

Subscribed and sworn to before me this 5th day of November, A. D. 1870.

EDWARD KURTZ, *Clerk.*

Approval.

NOV. 9, 1870.—Approved.

A. G. MILLER,
District Judge.

Order for supersedeas.

Whereupon it is ordered by said district judge that execution be superseded, and thereupon a writ of error and citation issued, and a copy of said writ of error lodged for defendant in error.

46 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United of States of America for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Robert Hohnbach, plaintiff, and George Q. Erskine, defendant, a manifest error hath happened, to the great damage of the said George Q. Erskine, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at

Washington on the first Monday of December next, in the Supreme Court to be then and there held that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, that of right and acccording to law and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this ninth day of November, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States the ninety-fifth.

EDWARD KURTZ,
Clerk U. S. Circuit Court East'n Dist. Wis.

(Indorsed:) Filed November 9, 1870. E. Kurtz, clerk.

47 The United States of America to Robert Hohnbach, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States of America for the eastern district of Wisconsin, wherein George Q. Erskine is plantiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this ninth day of November, in the year of our Lord one thousand eight hundred & seventy, and of our independence the ninety-fifth.

A. G. MILLER,
District Judge.

We accept service of above citation this 10th day November, A. D. 1870.

SMITH & STARK,
Att'ys for Def't in Error.

48 UNITED STATES OF AMERICA,
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file, and remaining of record in my office, being a full and complete copy of the record & proceedings in the suit of Robert Hohnbach vs. George Q. Erskine.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said eastern district of Wisconsin, this sixth day of December, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the said United States the ninety-fifth.

[SEAL.] EDWARD KURTZ, *Clerk.*

(Indorsement on cover:) No. 395. George Q. Erskine, collector of internal revenue, plaintiff in error, vs. Robert Hohnbach. Wisconsin C. C. U. S. Filed 13 December, 1870.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

GEORGE Q. ERSKINE, *Collector of Internal Revenue, Plaintiff in Error,*
vs.
ROBERT HOHNBACH.

No. 187.

In error to the Circuit Court of the United States for the eastern district of Wisconsin.

BRIEF FOR THE PLAINTIFF IN ERROR.



In the Supreme Court of the United States.

DECEMBER TERM, 1871.

GEORGE Q. ERSKINE, *Collector of Internal Revenue, Plaintiff in Error,*
vs.
ROBERT HOHNBACH.
} No. 187.

In error to the Circuit Court of the United States for the eastern district of Wisconsin.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT.

This was an action of trespass brought by the defendant in error against the plaintiff in error, then serving as collector of internal revenue, for the alleged seizure by the latter, in the city of Milwaukee, Wisconsin, on the 20th of May, 1869, of certain goods and chattels belonging to the former. The suit was commenced in the circuit court for Milwaukee county, on the 10th of November, 1869, and was afterwards removed by *certiorari* to the circuit court of the United States for the district of Wisconsin, where final judgment was rendered on the 5th of November, 1870.

The declaration set forth that the defendant, on the 20th of May aforesaid, at, &c., seized and took certain property and effects of the plaintiff, naming them, of great value, &c., and converted and disposed of the

same to his own use, and other wrongs to the said plaintiff then and there did, to the great damage of the plaintiff, &c.

Defendant pleaded the general issue, and also two special pleas. The issue was joined on the first plea, and a replication made to each of the special pleas. Defendant joined issue on the replication to the first special plea, and put in a rejoinder to the replication to the second special plea, (designated the third plea in the Record,) on which the plaintiff joined issue, and the case then went to the jury.

The third plea and the replication thereto (see Record, pp. 9 to 15) give rise to the principal questions presented for the decision of this court.

The defence set up by this plea was, in substance, that therefore, to wit, on the 20th of April, 1869, the assessor of internal revenue for the district made and delivered to the defendant, then collector for the same district, a certificate and copy of an assessment of a certain tax against the plaintiff, which the assessor had before that time assessed against the plaintiff, who was then and there engaged in the manufacture of tobacco and subject to taxation under the acts of Congress relating to the collection of internal revenue, &c.; that upon receiving said copy of assessment it became the duty of the defendant to collect the amount so assessed, &c.; that in pursuance of the power and authority by law vested in the defendent, he gave to the plaintiff at, &c., on, &c., a demand and notice that the said tax was due and payable on or before, &c., and that unless the same should be paid within that

time it would become the duty of the defendant to collect the same, with a penalty, &c.; that the plaintiff did not pay, nor offer to pay, the same to the defendant within the time named in the notice; that thereupon, on, &c., the defendant issued to his deputy a warrant to distrain, &c.; that thereupon the said deputy, under said warrant, made distraint, &c.; and that this distraint is the identical taking complained of in the declaration.

The replication averred that the tax assessed against the plaintiff, as alleged in the plea, was never owing by him, inasmuch as he did not manufacture and sell, or remove, within the period mentioned in the assessment, the tobacco therein described, or any part thereof, but only other tobacco upon which he paid the tax chargeable therefor, &c., and that he has paid the taxes chargeable against him upon all the tobacco manufactured by him, and sold or removed for consumption or use during said period, &c.

The defendant, after verdict, moved in arrest of judgment, but the motion was overruled. (Record, pp. 18, 19.)

The plaintiff in error assigns as error—

First. That on the facts stated in the third plea, and not traversed by the replication, an action of trespass will not lie against a collector of internal revenue.

Second. That the third plea is an answer to the present action, because the replication thereto fails to allege an appeal to the Commissioner of Internal Revenue to abate the tax assessed upon the defendant in error.

ARGUMENT.

1. It is a well-settled principle of the common law that an action of trespass will not lie against an officer for obeying a warrant issued by a tribunal of competent jurisdiction, and valid upon its face.

Case of the Marshalsea, 10 Rep., 76.
Com. Dig., Imprisonment, H, 8; Pleader, 3, M, 24.
Luddington *vs.* Peck, 2 Conn., 700.
Kerlin *vs.* Heacock, 3 Binn., 215.
Beaty *vs.* Perkins, 6 Wend., 382.

And this principle applies to collectors of taxes acting under warrants from assessors and boards of public officers whose duty it is to assess taxes.

Thurston *vs.* Martin, 5 Mason, 500–501.
Sprague *vs.* Bailey, 19 Pick., 436.
Hays *vs.* Drake, 6 Gray, 387.
Howard *vs.* Proctor, 7 Gray, 128.
Prince *vs.* Thomas, 11 Conn., 472.

The law requires the assessor to furnish the collector with a list of the persons liable to pay taxes, and upon receiving such list becomes the duty of the collector to collect the taxes included therein.

14 Statutes at Large, 103, 104, 106.

The list thus furnished must, like a warrant, protect the collector acting in accordance therewith, when valid on its face, and issued by a person actually exercising the duties of assessor of that collection district.

The remedy of the tax-payer is to pay his tax under

protest, and bring an action of assumpsit to recover it back.

Philadelphia *vs.* The Collector, 5 Wallace, 751.

Lincoln *vs.* Worcester, 8 Cush., 55, 58, 59.

Upon the third plea and the replication thereto this action therefore will not lie, and judgment should have been arrested.

2. The replication to the third plea is bad, as it omits to allege an appeal to the Commissioner of Internal Revenue for an abatement of the tax. This is a condition precedent to an action to recover back the tax.

The Collector *vs.* Hubbard, 12 Wallace, 1.

This defect is fatal to the maintenance of the action, and is not aided by verdict, because it was a matter collateral to the issue tried and covered by the verdict, and cannot be presumed to have been proved at the trial.

1 Wms. Saund., 228*a*, 228*b*.

Rushton *vs.* Aspinall, 2 Doug., 674.

Jackson *vs.* Pesked, 1 M. & S., 234.

Smith *vs.* Jackson, 1 Paine C. C., 486.

The defendant in error cannot take advantage of allegations or recitals in other parts of the record not connected therewith to make good any defect in his replication. That must stand or fall by itself.

1 Chit. Pl., (8th Amer. ed.,) 563.

Davies *vs.* Penton, 6 B. & C., 216.

C. H. HILL,

Assistant Attorney General.

SUPREME COURT

OF THE UNITED STATES.

GEORGE Q. ERSKINE,

Plaintiff in Error,

vs.

ROBERT HOHNBACH,

Defendant in Error.

Brief and Points for Defendant in error.

SMITH & STARK,

for Defendant in Error.

J. H. Yewdale, Law Printer, cor E. Water and Huron sts.

SUPREME COURT

OF THE UNITED STATES.

GEORGE Q. ERSKINE,

Plaintiff in Error,

vs.

ROBERT HOHNBACH,

Defendant in Error.

Brief and Points for Defendant in error.

There is no bill of exceptions in this case, and the errors alleged are only in the pleadings.

The action was commenced in the State court, by the defendant in error against the plaintiff in error, who was collector, under the internal revenue act, of the first district of Wisconsin. On his application, the cause was removed to the Circuit Court of the United States for the Eastern District of Wisconsin.

The declaration is in trespass for seizing personal property.

The pleas are briefly:

1st. Not guilty.

2d. That the defendant was collector as aforesaid; that the plaintiff was a manufacturer of tobacco in that district, and violated the internal revenue in sundry particulars, and did not pay the tax imposed by law on certain tobacco manufactured and sold by him; that the assessor of internal revenue in that district made an

assessment against him for the amount of such unpaid tax; that the plaintiff, before the collection of the assessment, "took and made an appeal from said assessment to the Commissioner of Internal revenue, according to law," and that the assessment was by him affirmed, and was ordered by him to be collected; that the defendant, having given due notice to the plaintiff, distrained and sold the property mentioned in the declaration for the amount of the tax and costs.

To which the plaintiff replied *de injuria, &c.*

Afterwards the defendant filed a third plea, setting out in substance the assessment made in March, 1869, annexing a copy; the delivery to the defendant as collector; the notice to the plaintiff thereof, and the demand; the non-payment by him (he being a resident of the district and engaged in the manufacture of tobacco); the distraint for the tax upon the property mentioned in the declaration; the sale thereof for the tax and costs; that this was the taking set forth in the declaration.

The plaintiff replied that the tax so assessed was never chargeable on him; that he had not manufactured and sold or removed the tobacco mentioned in the plea for which the tax was assessed, and that he had paid all the taxes chargeable against him upon all the tobacco manufactured and sold or removed, as stated in the assessment.

The defendant, in his rejoinder, denied that the plaintiff had paid the taxes chargeable against him upon all tobacco manufactured and sold or removed by him, "to-wit: he has not paid the said sum assessed against him as in said plea stated, which sum was duly assessed against him for tobacco manufactured by him, and sold or removed for consumption or use during the period mentioned in said assessment. The conclusion was to the country, and the plaintiff joined in the issue.

The verdict was for the plaintiff for the amount of the sale and interest.

The defendant moved in arrest of judgment, which motion was overruled, and judgment was entered for the plaintiff.

The defendant gave a bond for a supersedeas, and brought the case here on error.

POINT I.

The collector is liable to an action by a person whose property has been taken by the collector for a tax not owing to the United States.

The Internal revenue act clearly recognizes the right of action.

Act of June 30, 1864, Sec. 44 (13 Stat., p. 239), as amended by Sec. 9 of the Act of July 13, 1866 (14 Stat., p. 111).

This Court has decided the point.

Philadelphia vs. Collector, 5 Wallace, 720, 730 and 731.

Although the error be made by the assessor, he is not liable where he had jurisdiction, but the collector who commits the wrongful act is the proper defendant.

The Assessor vs. Osbornes, 9 Wallace, 567, 572.

POINT II.

Trespass is the proper action.

The act complained of, if not justified, was a trespass, and this action is the appropriate action. *Assumpsit* is *not appropriate*, except in cases where the *plaintiff pays the tax.* Here he could not pay the tax, and his property was seized and sold. Unless the statute prescribed assumpsit as the only form of action, it would be erroneous.

The statute expressly recognizes other actions and judgments against the collector than those brought strictly to recover back a tax, and does not prescribe assumpsit as the universal remedy.

The Commissioner of Internal revenue is authorized by Sec. 44, above mentioned, (Act of 1864, as amended by Act of 1866) to refund "all taxes erroneously or illegally assessed or collected"; "*and also repay to Collectors* or deputy Collectors, the full amount of such sums of money as shall or *may be recovered against them*, or any of them, in any court, for any internal taxes or licenses collected by them, with the costs and expenses of suit; *and all damages and costs recovered against* Assessors, assistant Assessors, *Collectors*, deputy Collectors and Inspectors *in any suit which shall*

be brought against them, or any of them, *by reason of anything that shall or may be done in the* DUE PERFORMANCE OF THEIR OFFICIAL DUTIES."

This statute recognizes two classes of actions which may be brought against collectors. One to recover back taxes illegally received by them; another class comprising actions brought to recover damages "*by reason of anything done by them in the due performance of their official duties.*"

The suit at bar is *in the second class.* While Mr. Justice Clifford says, delivering the opinion of the Court (5 Wallace, 731): "Appropriate remedy to recover back money paid under protest, on account of duties or taxes erroneously or illegally assessed, is an action of assumpsit for money had and received;" he does not say, and we suppose no court would say, that assumpsit would be an appropriate action where the collector had seized and sold the plaintiff's goods. On the contrary, in the paragraph of the opinion just preceding the one cited (5 Wallace. p. 731,) the Court construing this section, says:

"Evidently those clauses of this section contemplate *different grievances* and *different remedies for their redress* as known at common law, and in the practice of the courts."

What the remedy is for the redress of the grievance complained of, as known at common law, and in the practice of the courts, is not doubtful. It is not assumpsit. It is trespass.

The counsel for the United States argued to the Circuit Court that as the collector had only collected the tax which he was bound in law to collect upon the certified assessment delivered to him, he had acted in conformity to law, he had done no wrong, and he was not therefore subject to an action which assumes a wrongful act on his part. And therefore, he argued, assumpsit, not trespass, should be the remedy.

But this argument proves too much. For assumpsit against the collector is as much founded upon an unlawful or tortious receipt of money by him, as trespass is founded upon an unlawful seizure of goods by him.

Second. It has been the common practice of the United States to allow the validity of taxes to be tested in appropriate actions, brought against the collecting officer. Such actions charge him as a wrongdoer, although, *as between him and his government*, he may be innocent and justifiable. The receipt of the illegal tax is an act tortious in law; the seizure of property for the illegal tax is tortious in law. Yet this does not necessarily involve the charge of personal misconduct on the part of the officer; he may have been compelled to collect the money in either case, and have been wholly without discretion to refrain. Nevertheless, as between him and the citizen unjustly taxed, he is held to be a tort-feasor in both cases. The government has compelled him, its agent, to perform an act which the government had no right to require, and he is therefore liable. He alone can be sued. As the government sustains and indemnifies him, there is no failure of justice in any respect. It is in substance a suit against the government. The act cited recognizes that judgment may be rendered against him for acts "done in the due performance of his official duties." It provides for paying such judgments out of the treasury of the United States, and as we see in this cause the collector is defended by counsel employed by the United States.

The right to sue collectors of customs has been recognized under statutes not unlike that above cited.

Act of March 2, 1799, Sec. 71 (1 Stat. p. 678).

Act of February 24, 1807, Sec 1 (2 Stat., p. 422).

This Court has held that the right to sue *exists at common law*, and does not depend on those statutes, although it might be taken away by a statute.

Elliot vs. Swartwout, 10 Peters, 137, 156, *et. seq.*

Bend vs. Hoyt, 13 Peters, 263, 267.

See Cary vs. Curtis, 3 Howard, 253, *et. seq.*

Maxwell vs. Griswold, 10 Howard, 242, 255, 256.

In Gelston vs. Hoyt, 3 Wheaton, 246, a collector of customs was held liable *in tort* for a seizure of property.

Even a certificate of probable cause is no defence, unless the property be delivered back to the owner.

Act of February 24, 1807.

In Cary vs. Curtis, 3 Howard, at page 250, it is declared that the owner of property held by a collector of customs for a duty wrongfully claimed by the United States, need not pay the duty and sue to recover the money, but may bring suit against the collector for the property *or its value.*

Judge Story held (see his opinion at page 253) that it is the clear right of every citizen to have a judicial determination of the question of the lawfulness of the tax.

And so this Court, in 5 Wallace, p. 733, say: "Parties compelled to pay an illegal assessment, ought to have a convenient remedy to redress the injury." Certainly parties whose property is forcibly taken, and sold at auction to pay an illegal assessment, stand in no less need of a convenient remedy to redress the injury.

The amount of the plaintiff's verdict in this case was no more than if he had brought assumpsit, namely, the amount which the United States had received, with interest.

As to the general right to sue collecting officers, see

Dow vs. Chicago, 11 Wallace, 108, 112.

POINT III.

This last point made by the counsel for defendant below, and that on which he chiefly relied, was that the replication to the third plea does not allege that the plaintiff took an appeal from the assessment to the Commissioner of Internal revenue.

We pass over the other point suggested in folio 41 of the record, that the replication should have shown that the "tax was illegally and improperly assessed"; because that appears by the statement in the replication that the tax was paid by the plaintiff on all the tobacco manufactured and sold or removed.

The argument for the plaintiff in error, is understood to be based on the principle that, where a right of action is given by a statute, the declaration thereon must negative the exceptions

in the statute. The exception in this statute is claimed to be created by section 19, act of July 13, 1866 (14 Stat., 152), which is in the following words:

Sec. 19. And be it further enacted, that no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of soid Commissioner be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: Provided, that if said decisiou shall be delayed more than six months from the date of said appeal, than said suit may be brought at any time within twelve months from the date of such appeal.

The rule of pleading on which the objection is grounded is thus accurately and carefully stated by Chitty (1 Ch. Pleading, 255):

"In pleading upon statutes, *where there is an exception in the enacting clause*, the plaintiff must show that the defendant is not within the exception: but if *there be an exception in a subsequent clause, that is matter of defence*, and the other party must show it to exempt himself from the penalty."

There are several answers to this argument.

First. This provision of section 19 is not in the enacting clause of section 44. The last named section was in the first internal revenue act, passed in 1864, and has remained in full force, except as amended by the act of 1866 (14 Stat., p. 111), in particulars immaterial to the present question. The provision relied upon by the plaintiff in error, was enacted two years afterwards, and is not in form or substance an amendment to section 44, nor an exception thereto. It is by no means therefore within the rules above laid down.

Second. The provision of section 19 is a restriction or limitation

upon the right to sue theretofore existing. It is therefore *matter of defence.* If available in this case as a bar to the action, it should have been set up by the defendant in his plea or rejoinder.

Rex v. Hall, 1 Term R., 320.

"For if a subsequent statute make an exception to a former one, it is incumbent on the defendant to show, by way of defence, that he comes within such exception." Page 322.

"Where the exemption is returned under a proviso in a *subsequent* section, or *act of parliment*, it is a matter of defence."

1 Saunders, 262 *b.*

Great Western Co. v. Hawks, 36 Ill., 281.

Chitty says (1 Pleading, 254):

"It is also a general rule of pleading, that matter which comes more properly from the other side need not be stated. In other words, it is enough for each party to make out his own case or defence. He is not bound to anticipate, and therefore is not compelled to notice and remove in his declaration, or plea, every possible exception, answer or objection, which may exist, and with which the adversary may intend to oppose him."

He cites some illustrations of a forcible nature, and proceeds (page 255):

"If the plaintiff allege a *condition subsequent* to his estate, he need not aver performance, but the breach must be shown by the defendant, and matter in defeasance of the action need not be stated; and *wherever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, prima facie* well founded, whether called by the name of a proviso or a condition subsequent, *it must in its nature be a matter of defence*, and ought to be shown in pleading *by the opposite party.*"

The common instances of usury and the statute of limitations afford illustrations of this rule, which in the above terms clearly comprehends the defence under consideration. See other illustrations in Stephen on Pleading, 350, 1.

The correctness of this position appears more strongly in view of the foundation of this action, which is not based upon the statute, much less the act of 1866, but depends upon common law principles, and is so recognized by the act of 1864.

Stephen on Pleading, 374.

A complaint in an action for damages, resulting from defendant's negligence, need not aver that the plaintiff was in exercise of care. Potter v. R. R. Co., 20 Wis., 533.

The appeal to the Commissioner is no part of the plaintiff's cause of action. The trespass was complete without the appeal. It was not necessary to aver the fact of the appeal in the plaintiff's declaration. If no appeal had been taken, that fact was within the defendant's knowledge, and should have been alleged by him in a plea or in the rejoinder. If the plea of an assessment is good, the replication, showing the assessment unfounded, is a complete *prima facie* answer to the plea, and disposes of *that defence*. The replication is good, *because it nullifies the defence* made by the plea. If the replication be good, the defendant must rejoin by traversing it, or by alleging new matter in avoidance. If, notwithstanding the assessment was invalid, the plaintiff's right to contest it had been lost by omission to appeal or to bring suit in time, that fact not appearing on the record, the defendant must set it up by rejoinder or in a new plea; otherwise be lost the benefit of it.

Third. The limitation relied upon by the defence does not apply at all to this action. It relates exclusively to suits "*for the recovery of any tax* alleged to have been erroneously or illegally assessed or collected." It cannot fairly be stretched so as to include this action of trespass *de bonis*. It points specially to the *first* class of actions as defined in section 44 of the act of 1864, and omits, apparently by intention, all allusion to the second class of actions, in which ours is found. There is a plain distinction, not only in the statute, but in substance and in the nature of things, between the suit to recover back a tax paid by the plaintiff, and a suit to recover damages for a seizure of property. The law which declares assumpsit appropriate to the former, declares trespass or trover to be proper for the latter. The limitation in the Act of 1866, in terms embraces the first, and equally in its terms omits the second.

Such a limitation on the citizen's pre-existing right to sue is not to

be extended by construction beyond the reasonable meaning of the language.

Fourth. The third plea is defective in not alleging that the tax in question was lawful, or owing by the plaintiff. In a direct action against the collector, there is no presumption in favor of the validity of this assessment. It will be observed that the assessment (fol.26, Record)is made to supply a pretended deficiency in the returns made by the manufacturer during three months, both in fine cut and in chewing tobacco, and also for the purpose of charging a double rate of tax upon certain shorts. This last charge rests upon the assessor's suspicion, as appears in the second plea, that the shorts had not passed through a riddle of proper size. The assessment is special, imposed to meet an alleged fraud of the defendant in error. It could not be lawfully imposed without knowledge of the fraud, and there could be no presumption in favor of the assessment (in the absence of acts of Congress creating such presumption), *because there is no presumption in favor of the existence of fraud.*

The third plea should then have alleged facts to show that the tax assessed was owing by the defendant in error. An assessment of this nature may be made on the mere caprice of the assessor, and has no presumption to support it in an action brought to test the justice of the assessment. Besides if such presumption exist, it only governs the burden of *proof*, and does not alter the rule of *pleading.*

The plea being defective in substance, it is of no consequence whether the replication be good or bad. The first fault is in the plaintiff in error.

Fifth. If the replicatlon be defective, yet the fault *is cured by the verdict.* The defendant below should have demurred. The omission to set up the appeal to the Commissioner might have been bad on general demurrer, and yet good after verdict.

Rennes v. Bank of Columbia, 9 Wheaton, 581, 594, 5, 6.
Dobson v. Campbell, 1 Sumner, 319.
Stockton v. Moore, 4 Howard, 155.

Brown v. Barry, 3 Dallas, 365.
Roberts v. Graham, 6 Wallace, 578.
McMurdo v. Smith, 7 Term R., 514, 518.
Weston v. Mason, 3 Burrow, 1,725, 9.
Carson v. Hood, 4 Dallas, 97.
Smith v. United States, 1 Gallison, 261, 7.
Jackson v. Pesked, 1 M. & S., 237.
Dobson v. Campbell, 1 Sumner, 319, 326.
Townsend v. Jennison, 7 Howard, 706, 721.

"Serjeant Williams, in his learned note to 1 Saunders R., 228, *a*," (to quote from Judge Story, 1 Sumner, 326) thus lays down the rule, which has never been shaken:

"Where there is any defect, *omission*, or imperfection in any pleading, whether in substance or form, *which would have been a fatal objection on demurrer*, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated, or *omitted*, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or *omission is cured by the verdict by the common law.*"

See R. R. Co., v. Simmons, 38 Ill., 242.

And see the statute of jeofails, Judiciary Act of 1789, Chapter 20, Sec. 32 (1 Stat., 91). The courts of the United States shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects or want of form in pleading, "except those only in cases of demurrer, which the party demurring shall specially set down and express."

This Court has said of this statute:

"It must be admitted that Congress acted wisely in declaring that no litigant party should lose his right in law for want of form; and in going one step further, as Congress unquestionably has done, by declaring that, to save the party's rights, *the substance should be*

infringed on to some extent, when contrasted with modes of proceeding in the English courts, and with their ideas of what is substance." 3 Howard, 168.

By going to trial, the defendant below waived the point he ought have made on a demurrer.

Townsend v. Jemison, 7 Howard, 706, 716 to 725.
Aurora City v. West, 7 Wallace, 82, 91.

Sixth. This fault in the replication, if it be a fault, is purely technical, and the plaintiff in error, representing the United States government, and represented by the counsel of the government, is in no wise prejudiced by it.

If, as in Nichols v. United States, 7 Wallace, 122, the pleadings had shown that no appeal was taken to the Commissioner of Internal revenue, as required by law, the decision in that case might govern this. But the third plea and the replication simply omit to mention that appeal. If this appeal was necessary to be shown by the plaintiff below to get a verdict, then after a verdict it is to be presumed here, that it was shown. See authorities above cited, especially 9 Wheaton, 595, 6.

That is not all. *The defendant's own pleading*, the second plea to the declaration, *expressly states the appeal to have been duly made by the plaintiff.* Folio 18, Transcript of Record.

True, this is not technically the same thing as if it had been alleged in the third plea or the replication to the third plea. But it is enough to show to this Court where the very right of this matter is. It furnishes the fact, certified by the District Attorney of the United States, that the plaintiff had done the very thing, which it is claimed that he ought to have done. It demonstrates that the suggestion now made that no appeal had been taken is but a false pretence; that the objection is but a quibble, and that it cannot prevail without defeating the ends of justice.

The record shows that the replication was filed immediately after filing the third plea, upon the eve of the trial. If it were necessary to allege the appeal, yet it was natural that the plaintiff below, knowing that it had already been once set up in the defendant's pleadings

should have forgotten, in the haste of a term and impending trial, to repeat the allegation already upon the record, and which he might reasonably think to be conceded by the United States officers, seeing that it was a fact particularly within their knowledge, and relied upon already by them in same suit. If this be an error, is it not exactly such an error as was amendable, as should have been pointed out by demurrer, if insisted upon, as was waived by taking issue of fact upon the replication, and then going to trial thereon, as is cured by the verdict, obliterated by the statute of jeofails, and is unworthy the attention of this Court? The government of the United States has taken the property of this unfortunate plaintiff, has sold it under the hammer, and ruined him, upon a suspicion of fraud, which a full investigation and the verdict of a fair jury upon a fair trial have shown to be unfounded. Is it consistent with common integrity, with the justice it owes to the meanest citizen ti has wronged—is it consistent with the *honor* of this government now to harass and prosecute this man further, to endeavor upon such niceties of practice to delay indefiuitely, or to defeat the payment of this verdict? Is it a worthy object to pursue, to deprive the defendant in error of the scant redress awarded him after so long a struggle? Is there anything so sacred in a rule of pleading that its violation must be thus punished?

While officials in the Internal revenue Department may deem that course worthy of their zeal, and see their highest duty and their sweetest pleasure, in the torture of a tobacco manufacturer, we praise the constitution and laws of the United States that we are no longer in their hands. We thankfully believe that this Court will approve the views of the Circuit Judge, and will hold, as often before, that a mere doubt in pleading has a lower claim upon its consideration than the evident justice of the cause.

SMITH & STARK,

for Defendant in Error.